

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
OLIVIA AZAT *
Petitioner *
Olivia Azat *
Nabeel Mufarreh *
For the Petition *
*

***** *
Ivan Eloisa *
Kevin Martell *
Department of Housing and *
Community Affairs *
*

Board of Appeals Case No. S-2767
(OZAH Case No. 10-18)

***** *
Jane Lehrman, President *
Capella Homeowners Association *
John Flynn *
Robert Lehrman *
Wendy Tsunei Shi *
Opposed to the Petition *

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

Petition No. S-2767, filed on January 14, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 18708 Capella Lane, Gaithersburg, Maryland, on land in the R-90 Zone. The property's legal description is Lot 133, Block B of "Meadowvale" Subdivision.

The petition (Exhibit 1) specifies Olivia Azat as the Petitioner and Nabeel Mufarreh (reportedly, Petitioner's son) as her "Agent." Both list the subject site as their address in the petition, although evidence in the case reveals that Petitioner does not actually live on the premises. Exhibit 12, ¶ numbered 1 and Tr. 17.

This matter was scheduled for a hearing on May 13, 2010, by notice issued on January 26, 2010 (Exhibit 11(b)). On April 27, 2010, Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed a report recommending denial of the petition or postponement of the public hearing based on Petitioner's failure to supply Staff with information needed to complete their investigation and failure to respond to Staff's repeated inquiries. The basis for this recommendation was stated in the Technical Staff report (Exhibit 12, p. 2):

Insufficient data has been submitted by the applicant in order for staff to make all of the findings required for approval under §59-G-1 and §59-G-2. The applicant was notified several times via phone, electronic mail, and certified letter dated April 5, 2010. At each point of contact, the applicant's "agent" Nabeel Mufarreh was told of the inaccuracies within Ms. Azat's application and that essential filing data was needed in order to complete the review of the case. However, the applicant failed to respond. We continue to need a sketch drawn to scale, identifying the living spaces, an updated survey plat, and a correct landscape and lighting plan. (See Attachment 5) Based on what we have been able to determine is that, as proposed by the applicant, the accessory apartment exceeds the maximum size permitted for an accessory apartment within an existing single-family dwelling. We have not been able to determine, based on the initial filing, the length of ownership, when the accessory apartment was built, the square footage of the existing house, and other information identified in the attached certified letter. [Attachment 5 to Exhibit 12]

In a report dated April 22, 2010, Housing Code Inspector Ivan Eloisa of the Department of Housing and Community Affairs (DHCA) reported that he had inspected the premises on February 25,

2010, and found numerous problems (Exhibit 14):

1. The owner of record since January 2009 is Olivia Azat. The owner's son, Nabeel Mufarreh, is the prior owner from September 2003-January 2009. He is also the occupant of the home and landlord of the accessory apartment. Olivia Azat does not reside at the property.
2. The garage was converted into a two level accessory apartment. According to the permit/license obtained by Nabeel Mufarreh in 2006, no kitchen was to be installed in the converted garage (see attached).
3. Currently there are three accessory apartments in the home, one where the garage used to be, one in the rear side of the basement, and one in the front side of the basement. The owner obtained permits for the additions; he subsequently installed three full kitchens in addition to the main home kitchen creating three accessory apartments.¹
4. The two existing accessory apartments in the basement must be completely eliminated. The main structure must be converted back to single family use with free flow throughout, and only one kitchen.
5. The home does not have the appearance of a single family dwelling compatible with others in the neighborhood.
6. The deck was not constructed according to building permit plans.
7. Floor area of garage accessory apartment consists of 1,226 SF including two sleeping rooms bedroom 1 - 223 SF, bedroom 2 -295 SF. The maximum square footage of an accessory apartment is limited to 1,200 SF.
8. Currently a family of four resides in the garage accessory apartment.
9. An unrelated person resides in main structure with owner's son.
10. There are no licensed accessory apartments in the general neighborhood.
11. The owner must provide written documentation from licensed plumbing, electrical, and HVAC contractor(s) that the property is in code compliance and is safe to use.

The Petition was opposed by the Capella Homeowners Association (CHA) and by a number of neighbors. Exhibits 13, 15 -21, 27, 28, 32 and 34.

Since the Petitioner did not respond to calls from OZAH's administrative staff inquiring about whether to continue the case, the hearing proceeded as scheduled on May 13, 2010. Petitioner and her agent, Nabeel Mufarreh, appeared *pro se*. The Housing Code Inspector and his supervisor, Kevin Martell, testified, as did four opposition witnesses, including Jane Lehrman, President of the Capella Homeowners Association.

Petitioner and her agent testified that they never received either the Technical Staff report or

¹ A District Court docket attached to the Technical Staff report indicates that Petitioner was found guilty of running a rental facility at the subject site without a license on January 26, 2010, and fined \$500.00.

the DHCA report. The Hearing Examiner therefore recessed the hearing to give them an opportunity to read these documents. Tr. 18 – 24. Since so many members of the community had appeared to testify, it was decided to proceed with the hearing at that time, with the possibility of another hearing day for additional evidence if needed. Moreover, the Hearing Examiner kept the record open to give Petitioner the opportunity to supply the additional information needed by Technical Staff and DHCA. The deadlines were set based on the amount of time Petitioner's agent asked for, as indicated in the transcript (Tr. 79 -81):

MR. GROSSMAN: Let me set some dates here and mention some things that need to be submitted. We need a copy of your deed. You need to be in touch with technical staff and with the housing authorities. You need to give technical staff everything that's listed on the letter that they sent you.

MR. MUFARREH: That would be Renee and them, right?

MR. GROSSMAN: That's right. Renee Miller.

MS. AZAT: I need a copy of that.

MR. GROSSMAN: And you'll have to satisfy the housing authorities that you have complied with whatever needs to be complied with in order to make this a safe and habitable accessory apartment, and that it meets the maximum square footage requirements and so on.² How much time do you need to get the documentation together for Renee Miller?

MR. MUFARREH: I would say within two weeks I should be able to get her everything. I would probably need a month's time to comply with the housing authorities because they are asking me to get rid of some things and, you know.

MS. AZAT: To make it a smaller space.

MR. MUFARREH: Smaller living areas and stuff like that, so I need to, but on that aspect I should have it done within a month.

MR. GROSSMAN: I take it you don't have to make any further external changes in your home, is that correct?

MR. MUFARREH: No. Everything is internal.

MR. GROSSMAN: There's nothing outside of the house that has to be done?

MR. MUFARREH: No, sir.

MR. GROSSMAN: Is that correct?

MR. ELOISA: That's correct. It's all inside.

MR. GROSSMAN: All right. Today is the 13th and --

MS. AZAT: But we'll need a copy of that report from the technical.

MR. GROSSMAN: We'll make sure we give you a copy before you leave today. You can check across the hall and ask for a copy of that, okay?

MS. AZAT: Okay.

² Petitioner was supposed to eliminate one of the bedrooms to reduce the size of the accessory apartment to less than 1,200 square feet, as required by the Zoning Ordinance.

MR. GROSSMAN: Let's see, by Monday, June 14th, that's a month.

MR. MUFARREH: Okay.

MR. GROSSMAN: I expect that you will have submitted everything you need to submit and satisfied technical staff and the housing authorities, and will have submitted here the copy of your deed, and we'll give technical staff another two weeks after that until June 30 for technical staff review and any public comments. Because you'll have to file something here so that people can respond to it, if need be. Please send a copy of it to Ms. Lehrman, okay, of whatever you file so that she knows what's been filed.

MS. LEHRMAN: And that has to be filed by June 14th.

MR. GROSSMAN: Yes, by June 14th. And your responses, if any, by June 30.

MS. LEHRMAN: Okay. Understood.

MR. GROSSMAN: Along with technical staff. And then we'll say the record will close a week later on July 7. [Emphasis added.]

Despite the additional time granted to Petitioner, no further substantive filings were received from Petitioner or her agent. On June 15, 2010, Technical Staff filed a supplemental report recommending denial of the petition because Petitioner had “failed to submit the necessary information,” despite the June 14 deadline imposed by the Hearing Examiner and agreed to by Petitioner. Exhibit 35.³ Mr. Mufarreh e-mailed Technical Staff in response to the June 15 supplemental report, saying that he needed “a little bit of time” to get Staff the required documentation. Exhibit 35(b). Yet, Petitioner never submitted the additional information.

On June 16, 2010, Housing Code Inspector Ivan Eloisa e-mailed the Hearing Examiner to note the following (Exhibit 36):

The time granted to submit and satisfy documents from licensed plumbing, electric and HVAC contractor(s) that the property is in code compliance and safe to use expired on Monday June 14, 2010 and nothing has been submitted by the owner Olivia Azat or her son Nabeel Mufarreh.

I went to the property yesterday, Tuesday June 15, 2010 at 11AM and spoke with the owner's son Nabeel Mufarreh who said that he is waiting for the fax from the contractors to submit it. I informed him that we need the documentation to continue the process and that he was supposed to submit it by yesterday's date. He said that he would be coming to the office later today with the documentation, but did not show up.

³ A few days later, Staff forwarded a certified mail return receipt signed by Nabeel Mufarreh, evidencing his receipt of the supplemental report. Exhibit 35(a).

While I was there Mr. Mufarreh said that the tenants he had there moved out, and that he wants to continue with the process so that he can rent it to someone else. He said that the separation of the second bedroom in Accessory Apartment is almost finished to make the Accessory Apartment's living space less than 1,200 SF. [Emphasis added.]

The record closed on July 7, 2010, as scheduled, without any further communication from the Petitioner or her agent.

II. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, which are usually analyzed seriatim to determine whether a petition has met those standards.

This report does not contain the usual statement of facts and section by section analysis because Petitioner failed to provide the information required by Technical Staff and DHCA to fully evaluate this case. Despite repeated efforts by Staff to obtain the information from Petitioner and her agent and a month of additional time granted to Petitioner by the Hearing Examiner, at the hearing, Petitioner never supplied the required information.

Zoning Ordinance §59-G-1.21(c) provides:

The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Petitioner failed to meet these burdens – she did not produce the evidence necessary to establish her case, and she therefore could not meet her burden of persuasion. Usually, in accessory apartment cases, the Technical Staff reports provide most of the evidence needed to show that the proposed use satisfies all applicable general and specific standards specified in the Zoning

Ordinance. In this case, because of Petitioner's failure to supply Staff with the data it needed to evaluate the application, the Staff report (Exhibit 12) does not analyze the merits of the case, and there is a resulting dearth of evidence.

Moreover, Petitioner has failed to produce evidence satisfying the issues raised by the DHCA Housing Code Inspectors. She therefore has failed to meet this additional burden in accessory apartment cases.

The Hearing Examiner finds that both Technical Staff and DHCA made reasonable efforts to obtain the information they needed to complete their reports, but they were thwarted by the continuing failure of Petitioner's agent, Nabeel Mufarreh, to supply the required data, and by his repeated failure to keep his promises to do so.

The Hearing Examiner's conclusion amounts to both a finding on the merits that Petitioner has failed to meet her burden in this case and a finding that Petitioner's failure to follow reasonable requirements of the special exception process, despite being given multiple opportunities, warrants dismissal of this petition on procedural grounds.

III. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2767 for a special exception to permit an accessory apartment located at 18708 Capella Lane, Gaithersburg, Maryland, be DENIED.

Dated: July 27, 2010

Respectfully submitted,

Martin L. Grossman
Hearing Examiner